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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1965

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No. 18

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INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA, AFL-CIO, LOCAL 283,  
*Petitioner,*

*v.*

RUSSELL SCOFIELD, ET AL., *Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF FOR PETITIONER**

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**Opinions Below**

The decision and order of the National Labor Relations Board is reported at 145 NLRB 1097. Without opinion, the United States Court of Appeals for the Seventh Circuit denied leave to petitioner to intervene in the review proceedings brought in that court by the respondents Scofield, et al. The order denying leave to intervene appears at R. 8, and the order denying a petition for reconsideration of that action appears at R. 15.

### **Jurisdiction**

The order of the Court of Appeals denying leave to intervene was entered on September 16, 1964, and a timely petition for reconsideration was denied by order dated October 6, 1964.

The petition for a writ of certiorari was filed on November 4, 1964, and was granted on January 8, 1965. 379 U.S. 959.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **Question Presented**

When the National Labor Relations Board dismisses an unfair labor practice complaint against a union and the charging employees then bring review proceedings in a Court of Appeals pursuant to § 10(f) of the National Labor Relations Act, is the union entitled to intervene in the review proceedings wherein the union's compliance with or violation of federal law will be determined?

### **Statute Involved**

National Labor Relations Act, as amended, Section 10(f), 29 U.S.C. § 160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . . Upon the

filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

### **Statement**

This case presents the question whether a union accused under the National Labor Relations Act of violating the rights of dissenting members may be denied the opportunity to defend itself against this charge in the Court of Appeals review proceedings wherein the lawfulness of its conduct is to be adjudicated. The outcome of this dispute between the Union and its members is of particular and personalized concern to the Union, and the situation in which it arose warrants somewhat extended discussion.

This case originated in charges brought by certain employees of the Wisconsin Motor Corporation, located in West Allis, Wisconsin, before the National Labor Relations Board. They asserted that the petitioner Union had violated their rights under § 8(b)(1)(A) of the National Labor Relations Act.<sup>1</sup>

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<sup>1</sup> Section 8(b) provides in pertinent part that: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . ."

More specifically, the employees charged that Union enforcement (by way of disciplinary fines and court suit to collect the fines) of Union by-laws applicable to all Union members<sup>2</sup> denied them their Section 7 rights.<sup>3</sup> As summarized in the Board's decision and order, 145 NLRB at 1098, the Union regulation in question has been in effect for 25 years and, by its own terms, is designed to implement the Union's "basic object . . . to protect members . . . in their employment and to give them as much security as the industry can provide." Ceilings are established in each of the five labor grades to impose a limitation on the amount of "incentive pay" a member may earn over the "machine rate", the minimum contract rate for that job classification. The present ceilings are set at between 45 and 50 cents per hour over the machine rate.

When a member attains the ceiling rate for the day, he may continue to work. But, to comply with the Union rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a book-keeping entry, "bank" this production for later payments; he may later draw on this "bank" when for one reason or another he fails to earn the basic machine rate or even the lower "day rate." The Company itself, however, places no limitation on an employee's earnings and will, if the

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<sup>2</sup> The employees, pursuant to the current bargaining contract, are required either to join the Union and maintain good standing, or to reject membership and pay a service fee to the Union. 145 NLRB at 1097-8.

<sup>3</sup> Section 7 of the Act provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)".

employee so desires, pay him for all production which he reports.

The considerations which led the Union to establish this incentive pay ceiling were summarized as follows by the Board's Trial Examiner (145 NLRB at 1119):

"... the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some of which have been acknowledged by management spokesmen as having been reasonably grounded . . . These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of 'stakhanovism,' under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances."

Union members who violate these production ceilings are subject under the rule to a fine of \$1.00 for each violation. Persistent violators may be subject to a charge of conduct unbecoming a member; in that event a fine of \$100 or less may be imposed and a member suspended. Expulsion from the Union may also follow, though the member's status as an employee may not be impaired. Nonmembers of the Union are not subject to this rule. 145 NLRB at 1098.

Although the Union rule is not incorporated as such in the collective bargaining agreement as a term of employ-

ment, the Company has accepted the ceilings as "an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure." 145 NLRB at 1098. Moreover, the Company uses the ceilings in computing wages and evaluating jobs, and proposals to increase the ceilings have played important roles in the negotiation of collective bargaining agreements. And the Company, though not enforcing the ceiling rule, voluntarily aids and cooperates with the Union in administering the rule by making the necessary bookkeeping entries, allowing the current ceilings to be posted on its bulletin boards, and permitting Union officials to examine the members' production records on Company time. 145 NLRB at 1099.

At one such semi-annual inspection of the records in 1961, the Union found that six employees had violated the Union rule by reporting to the Company, for immediate payment, production in excess of the Union ceilings. Following appropriate Union procedures, they were found guilty of conduct unbecoming a member, were fined in amounts ranging from \$50 to \$100 and were suspended from Union membership for periods up to a year. Their job status, however, was at no time impaired or threatened. 145 NLRB at 1099.

Two members subsequently paid the fines; the other four filed charges with the Board, alleging that the Union's action in imposing the fines for breach of its production rule violated § 8(b)(1)(A) of the Act. The Union brought a state court suit to collect these unpaid fines.

The General Counsel of the Board issued a complaint against the Union; and following appropriate proceedings in which the Union participated as a party, the Trial Examiner issued his intermediate report recommending that the complaint be dismissed. Thereafter the Board

affirmed the Trial Examiner's conclusion that the petitioner Union had not violated § 8(b)(1)(A) and that the respondent employees' complaint should be dismissed. 145 NLRB 1097. In the majority's words, 145 NLRB at 1104, "The Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee."

Member Jenkins, concurring, rested on the proposition that the employees, being free either to join the Union and be subject to the rule or to refrain from joining and not be subject to the rule, were not "coerced" in their rights under § 7.

On the other hand, Member Leedom in dissent took the position that the fines imposed by the Union constituted restraint and coercion within the meaning of § 8(b)(1)(A) and that the proviso to that section did not protect the Union conduct in question. In his judgment, the Union's attempt to control production and wages clearly related to employment and not to Union membership and hence was not an internal Union matter. 145 NLRB at 1111.

Thereafter, on June 26, 1964, the respondent employees filed in the United States Court of Appeals for the Seventh Circuit a petition for review of the Board's order dismissing their complaint. R. 1-4. The petition for review prayed that the decision and order of the Board be vacated and set aside and that the Board be directed to enter an order "finding that the Union has committed unfair labor practices and granting appropriate relief." R. 3.

The Board duly filed an answer to the petition, averring that "the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were in all respects valid and proper." R. 5. And the answer prayed

that the court enter "a decree denying all the request for relief contained in the petition for review." R. 5.

On September 15, 1964, following the filing of the Board's answer, the petitioner Union filed a petition to intervene in the pending appellate review proceedings. R. 6-7. The petition asserted that "the Union will be directly affected by any decision rendered by this Court and desires to be heard on the merits of the controversy," and that the Union's "own interest and the interests of justice require that it be permitted to participate in this proceeding." R. 6. It was noted that no delay would be occasioned since the Union would file its brief within the time allotted to the Board under the court's rules. R. 7. The Board consented to the intervention petition; the employees did not.

On September 16, 1964, Circuit Judge Latham Castle, in accordance with previous rulings of the Seventh Circuit, entered an order denying the petition to intervene but granting leave to the petitioner Union "to file a brief in this cause as *amicus curiae* without leave to participate in the oral argument of this cause." R. 8. The Union thereupon filed a timely petition for reconsideration by the court *en banc* or by a panel thereof. R. 9-13. On October 6, 1964, however, the petition for reconsideration was denied by a panel composed of Chief Judge Hastings and Circuit Judges Knoch and Castle. R. 15.

This Court then granted the petition for writ of certiorari to review the order denying leave to intervene. 379 U.S. 959. Further proceedings in the Court of Appeals were stayed pending the completion of review by this Court.

## Summary of Argument

### A

Section 10(f) of the National Labor Relations Act is silent relative to the right of a person, charged before the Board with having committed an unfair labor practice, to intervene in court proceedings brought by the charging party to review the Board's dismissal of the complaint. But this silence of Congress has very little significance. *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 11. The failure of Congress in § 10(f) to spell out the intervention rights of a party charged with having committed an unfair labor practice cannot be taken as an indication that no such rights exist. This is especially true here where due process considerations and other indications of Congressional intent strongly militate in favor of petitioner's right of intervention.

### B

The demands of due process require intervention. This Court has consistently followed the principle that federal statutes should be construed and applied, whenever possible without doing violence to the words actually used, in such a manner as "will bring them into harmony with the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 101; and see *American Power Co. v. S.E.C.*, 329 U.S. 90, 107-108; *Greene v. McElroy*, 360 U.S. 474, 507-508. In that way serious constitutional problems that might adhere to a contrary construction are avoided. Thus the constitutional requirements of procedural fairness and due process must be deemed to permeate the review proceedings envisaged by § 10(f).

The presence of the petitioner as a party to the administrative proceedings was essential to the assertion of the

Board's jurisdiction. The whole purport of the Board proceedings was to determine whether a compulsory order should be directed to the petitioner commanding it to desist from enforcing its challenged rule. The essence of the appellate review proceedings was precisely the same as that of the administrative proceedings—to adjudicate petitioner's alleged Labor Act violation. Should the respondent employees prevail in the judicial review proceedings, the Labor Board will be ordered to reinstitute the complaint, to adjudicate petitioner a Labor Act violator, and to order appropriate remedial relief. In these circumstances the due process factors which compelled the joinder of the Union as a party to the Board proceedings would seem equally appropriate to the appellate review proceedings, at least to the extent of recognizing an absolute right on the part of the Union to intervene and defend its own interests under review.

An essential ingredient of procedural due process is the right to be heard at all critical stages where one's interests are directly at stake. The Union has the right to be heard directly; the Board is not the representative of the Union before the courts and Congress has nowhere taken from the petitioner the right to defend itself in the appellate court.

Furthermore, status as an *amicus curiae* is wholly inadequate; only as an intervener can the petitioner help shape the form of the record, determine the issues, participate in oral argument, petition for rehearing, seek certiorari. The *amicus curiae* rights, in short, are the products of the sufferance of the court rather than the products of due process considerations. The equitable and due process demands which of necessity underlie the review procedure of § 10(f) inescapably lead to a recognition of an absolute

right on the part of the petitioner Union to intervene, upon its request, in the proceedings below.

### C

Read in conformity with practical considerations, the judicial review procedures should be construed to require intervention, upon request, by a party charged with violation of the Labor Act. To allow intervention to the petitioner at this stage of the proceedings is to avoid multiplicity of litigation. Petitioner—if denied intervention and if adversely affected by an appellate reversal of the Board's order—would be an "aggrieved party" free to seek a subsequent review of an adverse Board order entered on remand from the appellate court. Allowance of intervention at this point would eliminate the need for such a fruitless proceeding.

Closely allied with the practical desirability of avoiding multiplicity of litigation (particularly of the empty variety) is the fact that intervention at this point assures that the possibility of review by this Court of any adverse determination will be fully explored and exhausted at a point where such a review would be most meaningful. Indeed, intervention at this point is the only way to assure that all interested parties would be present in any review proceedings before this Court.

The ultimate anomaly of intervention denial to a prevailing respondent before the Board is the disadvantage he may suffer by his own success before the agency. As a *losing* party, he could have appealed; as the *prevailing* party, he cannot participate as a party on review and may have an order entered against him by the courts without any opportunity to participate at a meaningful stage in the review proceedings.

## D

Read in *pari materia* with comparable legislation, the judicial review procedures should be construed to require the right of intervention and participation by the charged party. 5 U.S.C. § 1038, adopted in 1950, altered the pattern of judicial review of certain federal agencies and included a specific provision regarding intervention in the court of appeals by private parties directly affected by agency orders. The legislative history of that statute makes clear that Congress was following what it deemed to be the procedure for review of National Labor Relations Board orders. It would be irrational not to adopt the legislative policy of 5 U.S.C. § 1038 when interpreting and applying such provisions as § 10(f) of the National Labor Relations Act—particularly where such policy not only is the major Congressional expression on this matter but is consistent with the demands of due process and equity.

## E

The analogy of the Federal Civil Rules favors intervention here. Although those rules, of course, generally apply only to procedures in the federal district courts, the principles set forth provide useful analogies in the fair execution of the appellate review procedures contemplated by § 10(f) of the Labor Act.

Rule 19(a) deals with the necessity of joining as parties to a controversy "persons having a joint interest" therein. The equitable considerations underlying the need for joining indispensable parties, as recognized by Rule 19(a), are precisely the same considerations applicable here concerning the due process requirements of permitting appellate intervention by a party whose interests are directly at stake. Had it been possible for the respondent em-

ployees to bring an action in a federal district court, Rule 19(a) would clearly have required the joinder of the Union as a party defendant—which it so obviously is. No different result should follow in an appellate proceeding under § 10(f).

Equally analogous are the intervention provisions contained in Rules 24(a)(2) and 24(b)(2). The basic principle of allowing intervention under Rule 24 in order to safeguard private interests in the course of enforcing a public law is fully applicable to intervention in an appellate court. Intervention here would seem to be a matter of right under the compelling analogy of Rule 24.

### Argument

The issue in this case arises because Congress, in establishing the judicial review procedure of the National Labor Relations Act, as amended, has made no explicit provision regarding intervention, a silence which may have led the court below to deny intervention.

Specifically, § 10(f) is silent relative to the right of a person, charged before the Board with having committed an unfair labor practice, to intervene in court proceedings brought by the charging party to review the Board's dismissal of the complaint. The section simply provides that the person aggrieved by the Board's failure to grant the relief sought "may obtain a review of such order in any [appropriate] United States court of appeals . . . by filing in such court a written petition praying that the order of the Board be modified or set aside." The appellate court, says § 10(f), thereupon has complete jurisdiction "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

The charging party, of course, can invoke a § 10(f) re-

view proceeding in such a way as to avoid all problems of intervention. He can name as respondents in the petition for review not only the Board but all other parties in the Board proceedings, including the prevailing party.<sup>4</sup>

Where the charging party does not name the charged party as a respondent, there is a conflict among the circuits concerning the right of the prevailing respondent before the Board to intervene in the judicial review proceedings. *Pet. for Cert.*, p. 8. The rules in the Third, the Ninth and the District of Columbia Circuits require a petitioner seeking review of an administrative order to "serve a copy [of the petition] on all parties who have been admitted to participate in the proceedings before the agency . . ."<sup>5</sup> and these circuits are among those permitting charged party intervention in the appellate proceedings. *Pet. for Cert.*, p. 8. But in some of the other circuits, including the court below, when the petition for review designates only the Board as a respondent, omitting all other opposing private parties before the Board, the intervention rights of the prevailing party are less clear. Then, as in this case, a determination must be made as to whether the prevailing party has an enforceable right, upon request, to intervene in the appellate court.<sup>6</sup> We

<sup>4</sup> See, e.g., *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898 (C.A. 6), where the charging party (the union) filed a petition to review a portion of the Board's order setting aside its complaint against the employer for refusal to reinstate striking employees. The petition named as respondents both the Board and the employer.

<sup>5</sup> Rule 18(1) of the Third Circuit; Rule 34(1) of the Ninth Circuit; Rule 38(a) of the District of Columbia Circuit.

<sup>6</sup> An analogous problem arises with some frequency in this Court in cases involving review of administrative agency action. On occasion a petitioner in such a case will name only the agency as a respondent before this Court, omitting the other private parties who were involved in the agency proceeding and who were parties to the lower appellate proceeding by intervention or otherwise. Intervention is not normally allowed by this Court in cases within its appellate jurisdiction. But, on motion by an omitted party, the Court usually allows him to become a named respondent

submit in this brief that such a right of intervention arises (1) from the due process requirements of the Fifth Amendment, (2) from the proper implications of Congressional intention, and (3) from practical and fairness considerations appropriate to this Court's exercise of authority over the administration of justice in federal courts.

### A. *The Silence of Congress Is Not Controlling*

The appellate sections of the National Labor Relations Act are silent concerning the right to intervene in review proceedings involving Labor Board orders. Nor is there any discussion of intervention in the legislative proceedings leading to the enactment of these provisions in the 1935 Wagner Act or in the 1947 Taft-Hartley amendments.<sup>7</sup>

This silence of Congress has very little significance. In *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 11, this Court recognized that the silence of Congress as to the conventional power of an

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and thus to participate fully in the proceedings in this Court. See, e.g., *Wisconsin v. Federal Power Commission*, 369 U.S. 847; *Labor Board v. Lion Oil Co.*, 351 U.S. 979.

It has been said, with respect to this situation, that "Neither the Rules nor any good reason justify such an omission. It is unfair that any such persons who were adverse parties below and who will be prejudiced by reversal of the judgment not be given notice and an opportunity to oppose when the case is taken to the Supreme Court." Stern and Gressman, *Supreme Court Practice*, Sec. 6-35, p. 239 (3rd ed., 1962).

<sup>7</sup> Senator Wagner explained only that "Under the new bill, the orders of the Board are enforceable only through the Courts, and any aggrieved party has the right of appeal to the Courts. The bill does not take a single new step in outlining the respective scope of courts or administrative bodies". *Legislative History of the National Labor Relations Act, 1935* at p. 4. The Senate Report recites that "As is the case of other administrative tribunals, the Board upon the basis of evidence may issue an order, and this order may be brought by the Board or by an aggrieved person before the Circuit Courts of Appeal . . . The court can then affirm, set aside, or modify the order". *Id.* at p. 1107. There was further reference (in regard to filing a record) that Congress intended "the regular rules of the circuit courts of appeals" to be "applicable". *Id.* at 1364.

appellate court to stay the enforcement of an administrative order pending the appeal therefrom did not destroy or dilute that power. The controlling assumption, said the Court, is that "Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." And the Court emphasized (p. 11):

"The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress has said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

And so in this case, the failure of Congress in § 10(f) to spell out the intervention rights of a party charged with having committed an unfair labor practice cannot be taken as an indication that no such rights exist. In *Tatum v. Cardillo*, 11 F.R.D. 585 (S.D.N.Y.), the Court permitted an employer and its insurer to intervene as parties defendant in a suit for review of an order by a deputy commissioner in the Bureau of Employees' Compensation. It made no difference that the statute provided that the action should be brought against the deputy commissioner. "The statute does not provide that the deputy commissioner shall be the only *party* defendant." 11 F.R.D. at 586.

So, too, in *Roberts v. National Labor Relations Board*, — F.2d — (App. D.C., decided July 21, 1965), Judge Fahy pointed out that the National Labor Relations Act did not contain a provision (similar to the pro-

hibition against employers) making it an unfair labor practice for a union to discriminate against an employee because he has filed charges under the Act. But Judge Fahy added that "We think none was required." Judge Fahy reasoned that in light of the necessity to keep open the channels created by Congress for the administration of a public law and policy, "the legislators may have decided it was unnecessary to make specific prohibitions against union interference with the initiation of charges."

Even closer in point is *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197. There, the issue concerned the right of a union to be made a party in a Labor Board proceeding. The Board urged that "the National Labor Relations Act does not contain any provisions requiring these unions to be made parties; that Section 10(b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged." This Court rejected that contention because: "In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed." 305 U.S. at 233.

So here, a construction of the Act denying a person charged with violation of the Labor Act the right to be made a "party" and defend himself, would at once raise questions concerning the "validity of the Act if so construed."

#### *B. The Demands of Due Process Require Intervention*

This Court has consistently followed the principle that federal statutes should be construed and applied, whenever possible without doing violence to the words actually used, in such a manner as "will bring them into harmony

with the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 101; and see *American Power Co. v. S.E.C.*, 329 U.S. 90, 107-108; *Greene v. McElroy*, 360 U.S. 474, 507-508. In that way serious constitutional problems that might adhere to a contrary construction are avoided. Moreover, as noted in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate, and where applicable, permeates every valid enactment of that body."

Thus the constitutional requirements of procedural fairness and due process must be deemed to permeate the review proceedings envisaged by § 10(f). There is no language in that section that contradicts those requirements. The "manifest purpose in requiring a hearing," once the appellate jurisdiction has been invoked under § 10(f), "is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." See *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182; see also *Carter v. Kubler*, 320 U.S. 243, 247, construing a provision of the Bankruptcy Act as necessarily guaranteeing "a fair and full hearing."

An elemental ingredient of procedural due process is the right to be heard at all critical stages where one's interests are directly at stake. Compare *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353; and *Lane v. Brown*, 372 U.S. 477. It is that right that is involved in petitioner's effort to intervene in the court proceedings below. And it is that right that petitioner believes is incorporated into the provisions of § 10(f) by virtue of the foregoing principle of statutory construction, a principle grounded upon an irrebuttable presumption that, absent contrary words, Congress intended to make available all

rights essential to a due process hearing in the courts of appeals. The considerations that affirmatively justify and indeed compel such a reading of § 10(f), leading to the conclusion that petitioner has an absolute right to intervene in the court proceedings below, may be stated as follows:

With respect to the administrative proceedings before the Board, both the elementary dictates of due process and the express provisions of § 10(b) of the Act<sup>\*</sup> required that the petitioner Union be made a party to those proceedings. See *National Licorice Co. v. Labor Board*, 309 U.S. 350, 366. Charged with having committed an unfair labor practice, the petitioner was entitled to notice and opportunity to be heard at all stages of the Board proceedings and to participate fully as a party thereto. Only in that way could the petitioner adequately defend, explain and justify its rule regarding incentive pay ceilings; and only in that way could the petitioner hope to convince the Trial Examiner and subsequently the Board that enforcement of its rule did not violate § 8(b)(1)(A). Indeed, as the *National Licorice* opinion indicates, 309 U.S. at 362, in the absence of the petitioner as a party to such a proceeding, the Board would be without power "to make a binding adjudication of the rights in personam of parties [such as this Union] not brought before it by due process of law."

The presence of the petitioner as a party to the administrative proceedings was thus essential to the assertion of the Board's jurisdiction. Without that presence,

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<sup>\*</sup> Section 10(b) provides that the unfair labor practice complaint shall be served upon the charged party and that the person "so complained of shall have the right to file an answer to the original or amended complaint." See also Sec. 102.8 of the Board's Rules and Regulations, Series 8, revised Jan. 1, 1965, defining a "party" to Board proceedings to include "any person named as respondent . . . in any proceeding under the act . . ." 29 C.F.R. § 102.8.

the Board could not have made any determination as to the validity of the Union rule or issued, as requested, any order directed against the Union.<sup>9</sup> Here, the whole purport of the Board proceedings was to determine whether a compulsory order should be directed to the petitioner, commanding it to desist from enforcing its challenged rule. And those proceedings being of an adjudicatory nature, involving binding determinations directly affecting the legal and statutory rights of the petitioner Union vis-a-vis the respondent employees, it was imperative that the full scope of fair procedures normally associated with the judicial process be utilized by the Board—including the joinder of the Union as a formal party. Cf. *Hannah v. Larche*, 363 U.S. 420, 442.

Nor did the ultimate dismissal of the complaint by the Board in any way diminish the right of the petitioner to continue as a party to the Board proceedings. That right was generated by the original purpose and nature of the proceedings, not by their outcome before the Board. When the respondent employees, "aggrieved" by such dismissal for purposes of § 10(f), decided to seek judicial review of the Board's action, the essentially accusatory nature of the proceedings under review continued unaltered. The basic thrust of the appellate proceedings was to determine the legality of the challenged Union

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<sup>9</sup> In *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 232-233, the Court held that certain independent unions "having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside" by the Board; the Board order in the case directed the company—not the unions—to desist from giving effect to the contracts. But when the union is company-instigated or company-dominated, and when the union contracts are the "fruits of unfair labor practices", this Court has denied such a union an absolute right to participate in Board proceedings directed only against the employer. *Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261; *National Licorice Co. v. Labor Board*, 309 U.S. 350; *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146.

rule and to obtain relief against its continuance by the Union. The essence of the appellate review proceedings was precisely the same as that of the administrative proceedings—to adjudicate petitioner's alleged Labor Act violation. Should the respondent employees prevail in the judicial review proceedings, the Labor Board will be ordered to re-institute the complaint, to adjudicate petitioner a Labor Act violator, and to order appropriate remedial relief.<sup>10</sup>

In these circumstances the due process factors which compelled the joinder of the Union as a party to the Board proceedings, would seem equally appropriate to the appellate review proceedings, at least to the extent of recognizing an absolute right on the part of the Union to intervene and defend its own interests under review. It is one of "the ordinary rules respecting appeals" that "all parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis v. Mercantile Trust Co.* 152 U.S. 590, at p. 593.<sup>11</sup>

The Board order under review in this case was one that directly benefited the Union by recognizing its legitimate interest in incentive pay ceilings and by acknowledging the legality of the Union rule under § 8(b)(1)(A). A more intimate or substantial interest in the subject matter of the

<sup>10</sup> In that event, as will be shown later, petitioner would become a party "aggrieved" with a *pro forma* right to seek judicial review (see p. 28, *infra*).

<sup>11</sup> In the *Davis* case, this Court dismissed appeals taken by an individual bondholder and stockholder, allowed to intervene in the proceedings below, from orders confirming the sale of mortgaged property and decreeing a mortgage foreclosure. The appeals named only the Trustee as appellee and omitted the mortgagor, the mortgagee and other interested parties. Such omission led this Court to dismiss the appeals, stating that "Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties." 152 U.S. at 594.

appeal would be difficult to imagine. Recognition of the right of such an interested party to intervene and to become a formal party at the appellate level would thus appear to be something more than "of a technical nature . . . [it] rests upon the plainest principle of justice . . ." *Consolidated Edison Co. v. Labor Board*, *supra*, 233. The Board having no power to entertain an unfair labor practice charge or to enter an order against a person not a party to the proceeding, an appellate court should have no greater power on review. A court, no less than an administrative agency, cannot "adjudicate directly upon a person's right, without the party being actually or constructively before the court." *Mallow v. Hinde*, 12 Wheat. 193, 198.

The fact that the Board is a party to the appellate proceedings below and seeks to sustain the administrative order absolving the petitioner Union does not transform the problem or eliminate the unfairness inherent in the preclusion of the petitioner as a party. The Board, of necessity, participates in the appeal "as a public agency acting in the public interest." *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265.<sup>12</sup> It is not the representative of the Union; nor does it seek to vindicate or defend the parochial interests of the Union which lie at the heart of this appeal. Before the Court of Appeals, and on possible review in this Court, the Board may take action, espouse positions, or invoke procedures, with which the petitioner does not concur. The fact that

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<sup>12</sup> And see *Textile Workers Union of America v. Allendale Co.*, 226 F.2d 765, 768 (App. D.C.): "The right of the appellants to intervene is not affected by the fact that the general position they assert is already represented in the action by the Secretary of Labor. The Secretary's response to the motions to intervene declares that neither the appellants nor the appellees can show themselves to be directly affected by the [prevailing minimum wage level] determinations. This is hardly an assurance of adequate representation for the appellants. Even if the Secretary espoused the appellants' interests with greater heart, it would not necessarily preclude their appearance to plead for themselves."

the Union persuaded the Board that it had not violated the statute did not constitute a relinquishment to the Board of the defense of the Union's innocence upon the transfer of the controversy to the Court of Appeals. Congress has nowhere taken from the petitioner the right to defend itself in the appellate court in these circumstances.

Labelling the appellate controversy as one solely between the respondent employees and the Board is thus misleading. The interests of the petitioner Union are the very focus of that controversy; the whole thrust of the petition for review is to obtain an order directed at the Union. The Union for practical purposes is like those parties "whose interest in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity without which the court cannot proceed." *Barney v. Baltimore City*, 6 Wall. 280, 284. An appellate resolution of the statutory rights and obligations of an absent party is so "wholly inconsistent with equity and good conscience," *Shields v. Barrow*, 17 How. 130, 136, that such a party must be considered to have a due process right to intervene and to be heard when he so desires. And to interpret and apply § 10(f) as necessarily encompassing and incorporating that right makes § 10(f) consistent with "equity and good conscience" as well as with the inexorable commands of procedural due process. Congress has given no indication that § 10(f) is to be administered in any other manner. The petitioner's right to an opportunity to be heard in these circumstances is too fundamental a proposition in our jurisprudence to be read out of § 10(f).

Finally, the privilege of appearing and filing a brief *amicus curiae*, which was accorded the petitioner Union in this case, cannot be considered as an adequate substitute

for the right of intervention as a party in the appellate proceedings. An intervener, once he becomes a party, enjoys the full panoply of rights accorded the Board and the "aggrieved" parties encompassed by the due process concept of a fair hearing. These rights are broad and of great significance.

Typically, an intervener, but not an amicus, is permitted "to participate in the designation of the record".<sup>13</sup> The record consists of the pleadings, evidence, and proceedings before the agency<sup>14</sup> but the appendix includes only "those matters of record which are relied on by the parties in their briefs and which the parties desire the court to read".<sup>15</sup> The charged party vindicated by the Labor Board can, if permitted to intervene, put before the reviewing court that evidence which he desires the court to read. As an amicus, he is powerless if testimony and facts he deems crucial are omitted by opposing counsel from the appendix.

Typically, an intervener, but not an amicus, participates in the prehearing conferences where the parties "consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court". Agreement at these conferences "limits the issues".<sup>16</sup> The charged party vindicated by the Labor Board, if not permitted to intervene, may find that all the issues he considers vital have been "limited" out by agreement of opposing counsel. He cannot brief these excluded issues, even when the evidence concerning these issues have not been eliminated from the record by opposing counsel in designation of the record.

Typically, an intervener, but not an amicus, is entitled

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<sup>13</sup> Rule 14(f), United States Court of Appeals for Seventh Circuit.

<sup>14</sup> Rule 14(g), United States Court of Appeals for Seventh Circuit.

<sup>15</sup> Rule 16(d), United States Court of Appeals for Seventh Circuit.

<sup>16</sup> Rule 14(k), United States Court of Appeals for Seventh Circuit.

to participate in oral argument.<sup>17</sup> The function of oral argument is to provide counsel with the opportunity to answer questions which remain after the briefs have been studied. In all deference, it is suggested that the amicus brief of petitioner, but not the brief of the Labor Board, would raise questions in the mind of the reviewing court below. The brief of the Labor Board before the Seventh Circuit on the ultimate merits is exhaustive and thorough in its treatment of Section 8(b)(1)(A). The statute, its legislative history, the Labor Board and Court interpretations, and the commentaries by legal scholars are all discussed in depth. Nothing remains to be said on these points. But not once in the argument did the Labor Board brief refer to the record in this case, not once in the argument did the Labor Board brief refer to the facts of this case. Petitioner's amicus brief, on the other hand, discusses not a bare-bones legal proposition, but the facts and issues of this case: the 1937 UAW reaction to "Stakhanovism" or the "speed-up"; the 1943 UAW reaction to the War Production Board plan for "incentive pay"; the origin and reasons for the 1944 plan by the workers at Wisconsin Motors to place a limit upon piece-work earnings; and the proper balance to be sought between (i) the right of the union to protect its members and (ii) the right of the union members under Section 7 to violate union by-laws democratically reached by majority vote. Analogies are drawn from practical union practices, hypotheticals based on plant practices are raised to prove legal conclusions. In sum, the Labor Board brief filed below on the merits invites little if any oral controversy. The petitioner's amicus brief below invites a dialogue on the practicalities of industrial relations within the statutory framework. Denial here of the right to oral argument is, in a real and mean-

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<sup>17</sup> See, e.g. Rule 18(i) of the United States Court of Appeals for the District of Columbia Circuit.

ingful sense, a denial both of full participation in the review proceedings and of the right to self protection.

An intervener, but not an amicus, is permitted to petition for rehearing.<sup>18</sup> This right is not often used, but when its exercise is necessitated, it is a vital right indeed.

Finally, the intervener has the very important right to appeal and seek reversal of any adverse judgment. See the appeal and certiorari rights exercisable by interveners in *International Union v. Eagle-Picher Mining Co.*, 325 U.S. 335, 338-339; *United States v. California Co-operative Cannerys*, 279 U.S. 553, 559; and *Fishgold v. Sullivan Drydock Corp.*, 328 U.S. 275, 283. Where, as in this case, the rights of an absent party are being adjudicated, the only way such a party can protect itself against an adverse judgment is to intervene and seek a reversal on appeal. Where such a substantive "right of his own" is involved, *Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 255, a person's right to appeal—exercisable in this context only by an intervener—is an essential part of the due process right to a fair and full hearing.

An *amicus curiae*, on the other hand, has no appeal rights. Not being a party of record, he has no standing to seek to appeal or to apply for certiorari from any adverse judgment affecting his interests. *In re Leaf Tobacco Board*, 222 U.S. 578; *Ex parte Cutting*, 94 U.S. 14. In this critical sense, "an intervener must be sharply distinguished from a mere *amicus curiae* or a person who has been heard but has never intervened." 4 Moore's Federal Practice 104 (2nd ed., 1963). The *amicus curiae* rights, in short, are the products of the sufferance of the court rather than the products of due process considerations.

Hence the equitable and due process demands which of necessity underlie the review procedure of § 10(f) inescap-

<sup>18</sup> Rule 25, United States Court of Appeals for the Seventh Circuit.

ably lead to a recognition of an absolute right on the part of the petitioner Union to intervene upon request in the proceedings below. Only in that way can there be any assurance that the interests of the petitioner Union will be fully represented and that the Union will be fully enabled to protect itself against any adverse judgment directly affecting its interests.

*C. Read In Conformity With Practical Considerations, the Judicial Review Procedures Should Be Construed To Require Intervention, Upon Request, By a Party Charged With Violation of the Labor Act.*

Long ago, in a related context, this Court noted that "The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review", and that "The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements". *Ford Motor Company v. Labor Board*, 305 U.S. 364, 369, 373.<sup>10</sup>

Permitting intervention at this point would "secure a just result with a minimum of technical requirements". Denial of intervention would prevent "simplicity and directness both in the administrative procedure and on judicial review".

To allow intervention to the petitioner at this stage of the proceedings is to avoid multiplicity of litigation and especially to avoid a second and meaningless litigation. The

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<sup>10</sup> There, this Court affirmed the denial of a motion by the Ford Motor Company (which had filed a cross-appeal) to vacate an order granting the Board's motion to withdraw its petition for enforcement. This Court commented that "While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned". 305 U.S. at 370.

petitioner—if denied intervention and if adversely affected by an appellate reversal of the Board's order—would be an "aggrieved party" free to seek a subsequent review of an adverse Board order entered on remand from the appellate court. Judicial time and energy would then be expended in pursuit of issues already resolved in the instant appeal. Allowance of intervention in the first proceeding would eliminate the need for such a fruitless proceeding by permitting the petitioner to be heard once and for all and the issues of fact and law to be resolved fully and more intelligently in the light of the contentions of all interested parties. A more speedy disposition of the basic controversy is thus assured by intervention at this juncture. In the words of the Solicitor General,<sup>20</sup>

"... if the court reverses the Board's dismissal order, the party against whom the complaint was issued stands to incur a liability. Although this would not occur until after a separate judicial proceeding was instituted against that party [i.e., after an unfair labor practice order had been issued against the party pursuant to the appellate reversal and after the Board had filed a petition to enforce that order under § 10(e)] as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding. The Board believes that these considerations entitle the respondent before it to intervene in a review proceeding brought by the charging party, and therefore has not opposed timely motions to intervene in such circumstances."

In other words, the proceedings presently pending before the Court of Appeals below will undoubtedly result in a

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<sup>20</sup> Memorandum for the National Labor Relations Board, pp. 2-3, filed in this case in connection with the Petition for a Writ of Certiorari.

definitive determination of the petitioner's right under § 8(b)(1)(A) to execute its rule relative to incentive pay ceilings. That ruling, while not technically partaking of *res judicata* as respects the absent petitioner,<sup>21</sup> will have a highly influential if not decisive impact upon any and all future proceedings. If the ruling be adverse to petitioner's interest, that impact will be a prejudicial one, difficult and probably impossible to overcome from the petitioner's standpoint. The issues of fact will have been resolved and the legal and statutory problems will have been answered for all practical purposes in the instant review proceedings. And subsequent litigation as to those crucial matters would be form without substance.

Any suggestion that such an "ex post facto" judicial hearing suffices to protect the rights of the presently absent party is repelled by this Court's ruling in *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 330-331. There the Court rejected the argument that the right of applicant A to a hearing was not infringed by denial of A's participation in a prior administrative proceeding involving applicant B, when the grant of a license to applicant B would preclude the subsequent grant of a license to applicant A. In the Court's words: "We do not think it is enough to say that the power of the Commission to issue a license on a finding of public convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right of a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing." 326 U.S. at 330. The Court then noted that once a competing and mutually exclusive license is granted to an opponent, an opposing

<sup>21</sup> The ruling would not technically be *res judicata* only because of the failure of the respondent employees to name the petitioner as a party in the appellate proceedings.

party carries a burden in the subsequent proceeding "which cannot be met" because it makes "its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent." 326 U.S. at 331. Cf. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 420-423.

And so in this case, the petitioner Union would have an intolerable burden, "which cannot be met," of seeking at the subsequent proceeding a rehearing and reversal of the conclusions reached in the instant proceeding. The subsequent proceeding would indeed become "an empty thing". While the *res judicata* principle would not foreclose such an empty procedure, here as in *Atlantic Refining Co. v. Standard Oil Co.*, 304 F. 2d 387, 394 (App. D.C.),<sup>22</sup> where "actions [have been] brought by a private person to have an order or regulation of an administrative agency adjudged invalid, the *res judicata* test for determining whether an applicant for intervention in the action will be bound by the judgment therein is unworkable and inappropriate. This, because . . . a judgment invalidating the order or regulation will result in substantial injury to those deriving direct benefit therefrom and will be as final and conclusive to them as if they were bound by it under the doctrine of *res judicata* and no remedy will be open to them to redress the loss they will suffer because of such judgment."

Precisely that consideration led the Court of Appeals for the District of Columbia Circuit in *Textile Workers*

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<sup>22</sup> In the *Atlantic Refining Co.* case, the Court held that a refiner had an absolute right to intervene in District Court proceedings, brought by Standard Oil Co., testing the legality of oil import regulations issued by the Secretary of the Interior, inasmuch as the refiner would have no remedy against Standard should Standard succeed in upsetting the regulations which were beneficial to the refiner.

*Union of America v. Allendale Co.*, 226 F. 2d 765, 769-770, to permit a union to intervene as of right in lower court proceedings brought by employers to review and set aside certain prevailing wage determinations, particularly since "Multiplicity of suits can be avoided by settling such related controversies in a single action." If the union were excluded from this action, said the court, it would "eventually bring the controversy back to court to assert the position they ask to present now. The same issues, both of law and fact, would be involved . . . The interventions sought here would serve the ends of justice. They would also promote judicial and administrative convenience by avoiding a multiplicity of proceedings and by bringing to the aid of the tribunal the parties who 'may know the most facts and can best explain their implications.' " See also *Wolpe v. Poretsky*, 144 F. 2d 505, 508 (App. D.C.); *Champ v. Atkins*, 128 F. 2d 601 (App. D.C.); *Brotherhood of Locomotive Engineers v. Chicago, M., St. P. & P. R. Co.*, 34 F. Supp. 594 (E.D. Wis.).

Closely allied with the practical desirability of allowing intervention in order to allow all parties to be heard at one time and to avoid multiplicity of litigation (particularly of the empty variety) is the fact that intervention assures that the possibility of review by this Court of any adverse determination will be fully explored and exhausted at a point where such review would be most meaningful. As an intervener, the petitioner Union could of course seek certiorari from an adverse determination by the Court of Appeals. *International Union v. Eagle-Picher Mining Co.*, *supra*. And it could do so at the juncture where all parties—the Board, the charging party and the charged party—could be fully heard as to all issues, unencumbered and undiluted by any prior judicial determinations where the charged party was absent. A more satisfactory judgment

could then be rendered by this Court as to the appropriateness of reviewing such fully-developed issues.

On the other hand, denial of intervention at this stage might impinge upon the clarity and development of the issues open to review by this Court and might, for fortuitous reasons, make such review impossible. This Court has announced a policy in original actions before this tribunal that the effective determination of issues "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court. " *United States v. Louisiana*, 354 U.S. 515, 516. And "to that end," the Court in the *Louisiana* case allowed four States directly concerned with the litigation to intervene. A similar policy would appear applicable in the instant case in order to promote a more effective resolution of certiorari proceedings. To deny intervention in the court below to an interested party and to force him to seek a subsequent appellate and certiorari review of issues already resolved in the earlier proceeding is to weaken the development of issues available for certiorari review in both the earlier and the subsequent proceedings. In the earlier case, the denial of intervention means that an intimately interested party (the party charged with a Labor Act violation) cannot seek certiorari from this Court or appear before it as a full-fledged party; and in the second case, such a party is remitted to the intrinsically weak position of seeking certiorari to review issues already resolved in an earlier proceeding. Moreover, in this second case the charging party, who earlier prevailed, might well be denied intervention. The consequence is that in neither review proceeding would all the interested parties be present, although both proceedings are "essentially one so far as any question as to

the legality of the Board's order was concerned". *Ford Motor Company v. Labor Board*, 305 U.S. at 370.

Indeed, intervention in this situation may be the only way of assuring that this Court can effectively assess the reviewability and ultimately dispose of the issues resolved and developed below. If a decision adverse to the Union is rendered by the Court of Appeals and the Board's order is reversed, the Board or the Solicitor General may decide not to seek certiorari from this Court. Thus in *United Steelworkers v. Labor Board*, 376 U.S. 492, the Court of Appeals for the Second Circuit had reversed the Board's determination exonerating the union's conduct from the proscriptions of § 8(b)(4)(B) of the Act. The union, which had been allowed to intervene in the Court of Appeals, then sought and obtained certiorari from this Court, resulting in a unanimous reversal of the judgment of the Court of Appeals on this issue. The Board, however, had not itself sought certiorari in that case. And it declined to do so, as it explained to this Court, "because the Solicitor General concluded that other cases were entitled to priority in selecting the number of cases which the government can properly ask this Court to review."<sup>23</sup> Had the union been denied intervention in the *United Steelworkers* case, it could not have sought certiorari and the Solicitor General's determination—unrelated as it was to the erroneousess of the Second Circuit's decision—would have ended the case.

Intervention may thus have an intimate relation to the effectuation of appeal and certiorari rights and to the judicial consideration of fully developed issues. Professor Moore has noted that the whole concept of intervention,

<sup>23</sup> Memorandum for the National Labor Relations Board, p. 2, filed in connection with the union's petition for certiorari, *United Steelworkers v. Labor Board*, 376 U.S. 492, No. 89, Oct. Term 1963.

as first developed in the civil, the ecclesiastical and the admiralty courts, was historically related to the perfection of the appeal rights of the absent but affected individual. "Apparently, intervention in Roman law was rather extensive, although intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal and the petitioner's interest thus be inadequately protected." 4 Moore's Federal Practice 9 (2d ed., 1963). This historical theory of intervention has its counterpart in modern federal practice.<sup>24</sup> Thus, in a Labor Board case, for example, the Sixth Circuit was persuaded to grant intervention to individual employees subsequent to the entry of a judgment setting aside a Board order awarding them reinstatement and back pay. *N.L.R.B. v. Johnson*, 322 F. 2d 216 (C.A. 6). The employees, who had not been represented theretofore in the appellate proceedings, were allowed to intervene "for the purpose of perfecting an appeal to the Supreme Court."<sup>25</sup>

<sup>24</sup> In *National Coal Association v. F.P.C.*, 191 F.2d 462, 467 (App. D.C.), fairness was said to require that a potentially aggrieved person be allowed to intervene in administrative proceedings to enable that person to seek judicial review, where such review was available only to parties before the agency who were "aggrieved" by its order. And in *American Communications Association v. United States*, 298 F.2d 648, 650-651 (C.A. 2), fairness was held to require intervention by an interested party before an agency from the outset of the administrative proceedings—thereby allowing the intervener to participate fully in the proceedings—"in order to make the right to [judicial] review effective." Only by such intervention could the intervener fully develop the issues he might have available should he ultimately seek judicial review.

More recently, in *Northeast Airlines, Inc. v. C.A.B.*, 345 F.2d 488, 489-490 (C.A. 1), the court, after having remanded the case to the agency for further proceedings and then holding that the new administrative order was discretionary and not subject to review, allowed intervention by two competing carriers solely in order to permit them to seek review by certiorari in this Court. The court had previously denied intervention to the carriers in the original review proceeding "so long as these carriers are precisely aligned with the Board." 345 F.2d at 489.

<sup>25</sup> The order allowing intervention is not reported. It was entered on Nov. 29, 1963, in *N.L.R.B. v. Johnson*, No. 15,031 (C.A. 6). See Petition

Intervention in the context here described thus works to make more meaningful the ultimate review powers of this Court and to give to the most directly affected party the opportunity to apply for certiorari when the issues are most ripe and fully developed for consideration, and with all parties before the Court.

Finally, the ultimate anomaly of intervention denial to a prevailing respondent before the Board is the disadvantage he may suffer by his own success before the agency. Where the charged party *loses* before the Board, he may as an "aggrieved" party seek review as a full-fledged party in the court of appeals; and in that capacity he may seek or oppose this Court's ultimate review of the case. But as a *prevailing or winning party* before the Board, if he is not named as a respondent in the appellate court and if he is then denied intervention in that court, he cannot participate as a party there or before this Court and he may neither seek nor oppose this Court's grant of review.

The right of a person, accused before a federal agency of having violated a provision of federal law, to participate in the judicial review of the agency proceedings against him is too fundamental for the fortuity of success before the agency to govern its observance. To read such fortuity into intervention rights under § 10(f) is to impute to Congress "a desire for incoherence" and "caprice" which the statutory language does not command. Cf. *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 394. Such a reading should not be sanctioned by this Court.<sup>26</sup>

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for Writ of Certiorari in *Taylor v. Johnson*, No. 795, Oct. Term, 1963. The employees' petition for certiorari was later denied by this Court. *Taylor v. Johnson*, 376 U.S. 951.

<sup>26</sup> An additional element of fortuity now exists by reason of the conflicting policies of the various courts of appeals respecting intervention by prevailing parties, charged before the Board with committing unfair labor practices. The Seventh and First Circuits uniformly deny such intervention, while most other Circuits, including the District of Columbia,

In sum, there are intensely practical reasons why the allowance of intervention to a party like the petitioner Union would promote the effective and fair execution of § 10(f) review proceedings: (1) intervention would centralize the entire controversy and limit it to one appellate review proceeding, eliminating the need for the absent party to seek another and doubtless futile review should the original Board order be reversed; (2) intervention would assure that all interested parties—and particularly the party against whom relief is sought—will be heard together; (3) intervention would assure that all factual and statutory issues will be developed as fully as possible and in light of the contentions of all interested parties; (4) intervention would assure that the certiorari review powers of this Court will be invoked and exercised at that point where the issues are most fully developed and where all parties can be heard; and (5) intervention in these circumstances would eliminate the fortuitous element of success or defeat before the Board as the determinant of the right of the accused party to participate in the appellate proceedings. In short, intervention is both fair to the party most directly concerned with the Board order and of substantial assistance to the effective judicial administration of § 10(f). The only rational Congressional intent that can be deduced from § 10(f) is one that reaches this result.

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permit intervention. A prevailing respondent's right to intervene thus depends at the moment upon the Circuit in which the aggrieved party seeking review under § 10(f) has his residence or place of business so as to be able to file a petition for review in that Circuit; and since the aggrieved party can in any event file his petition in the District of Columbia Circuit, that fortuitous choice would make intervention possible regardless of the policy of the Circuit wherein the aggrieved party resides.

***D. Read in Pari Materia With Comparable Legislation,  
the Judicial Review Procedures Should Be Construed  
to Require the Right of Intervention and Participa-  
tion By the Charged Party.***

When, as here, the statute is silent on the question of intervention, Congressional intent may be gleaned from like statutes dealing with like problems, especially, as here, when the legislative history of subsequent analogous review provisions makes explicit reference to the review procedure of the National Labor Relations Act.<sup>27</sup>

5 U.S.C. § 1038 is a subsequent statute dealing with the review of administrative orders. It sheds light on the Congressional intent in the Labor Act review provisions because it makes special reference in the statute to the problem of intervention and in the legislative history to the procedures under the National Labor Relations Act.

Prior to 1950 the orders of certain federal agencies<sup>28</sup> were reviewable by three-judge district courts in accordance with the pattern established by the Urgent Deficiencies Act of 1913 (see 28 U.S.C. § 2284, as amended); an appeal as of right could then be made to this Court. In 1950 this pattern was altered by substituting judicial review in the first instance by an appropriate court of appeals, followed by further review by this Court in accordance with cer-

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<sup>27</sup> Cf. *Labor Board v. Local Union No. 639* (Curtis Bros.), 362 U.S. 274, 291-292: "To be sure, what Congress did in 1950 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1950 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit".

<sup>28</sup> The orders were those of the Federal Communications Commission under the Communications Act of 1934, the Secretary of Agriculture under the Packers and Stockyards Act and the Perishable Commodities Act, and the United States Maritime Commission under the Shipping Act and the Interoceanic Shipping Act.

tiorari standards. See 5 U.S.C. §§ 1031-1042.<sup>29</sup> Congress in this legislation purported to adopt "the pattern established for review of orders of the Federal Trade Commission . . . and followed by other laws since then in relation to many other agencies, including the Securities and Exchange Commission, the Bituminous Coal Commission, and the *National Labor Relations Board*." <sup>30</sup> (Emphasis added.)

In establishing this pattern of judicial review, modeled, as the House Report said, after the procedures created by the National Labor Relations Act among others, Congress included a specific provision regarding intervention in the courts of appeals by private parties directly affected by the agency orders. This provision, 5 U.S.C. § 1038, reads in its entirety as follows:

"The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and *any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right*, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but

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<sup>29</sup> The agency orders covered by this legislation included not only those mentioned in footnote 28, *supra*, but also those of the Atomic Energy Commission made reviewable by 42 U.S.C. § 2239. See 5 U.S.C. § 1032.

<sup>30</sup> H. Rep. No. 2122, p. 4, accompanying H.R. 5487, 81st Cong., 2d Sess. (1950); 2 U.S. Code Congressional Service, 81st Cong., 2d Sess. (1950), 4306.

said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or non-action of the Attorney General therein." (Emphasis added.)

This intervention provision bears a strong resemblance to an even earlier provision of federal law, 28 U.S.C. § 2323, dealing with judicial review of Interstate Commerce Commission orders. That provision states that "The Interstate Commerce Commission and *any party or parties in interest to the proceeding before the Commission*, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party." (Emphasis added.) See *Sprunt & Son, Inc. v. United States*, 281 U.S. 249; *Hudson Transit Lines v. United States*, 82 F. Supp. 153 (S.D.N.Y.), affirmed 338 U.S. 802.

Congress has thus exhibited its concern that private parties in interest be given an unqualified right to intervene and participate in the appellate review proceedings involving the specified agency orders. The content of 5 U.S.C. § 1038, like the other portions of the 1950 legislation, was "evolved from long study and careful consideration by all persons concerned with the difficult questions involved," and was said to represent "an important improvement in judicial procedure—one that will make for economy and expedition in the disposition of a considerable class of business in the Federal courts."<sup>31</sup>

The broad intervention policy adopted by Congress in these statutes must be viewed as grounded upon all the considerations of equity, fairness and due process which

<sup>31</sup> H. Rep. No. 2122, p. 5, *supra*, footnote 30; 2 U.S. Code Congressional Service, 81st Cong., 2d Sess. (1950), 4307.

have heretofore been discussed. And it becomes reasonable to inject that policy into a judicial review provision that is silent on the subject of intervention. Indeed, it would be irrational not to adopt this legislative policy when interpreting and applying such provisions as § 10(f) of the National Labor Relations Act.<sup>32</sup> For that policy not only is the major Congressional expression on this matter but is consistent with the demands of due process and equity—which must in any event be imputed to Congressional legislation otherwise silent on the matter.

#### *E. The Analogy of the Federal Civil Rules Favors Intervention Here*

The Federal Rules of Civil Procedure generally apply only to procedures in the federal district courts. But the principles set forth therein—particularly in Rules 19 and 24—provide useful analogies in the fair execution of the appellate review procedures contemplated by § 10(f) of the National Labor Relations Act, as amended.<sup>33</sup> Those

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<sup>32</sup> Section 10(f), enacted in 1935, was not altered or discussed in the 1947 Taft-Hartley Amendments. However, an entirely new judicial provision was added to the Act in 1947. Section 10(1) requires the Labor Board, under certain circumstances, to seek District Court injunctive relief against certain types of union unfair labor practices. Senator Taft explained that in these judicial proceedings the Labor Board acts "in the public interest and not in vindication of purely private rights". *Legislative History of the Labor Management Relations Act, 1947*, at p. 414. Nonetheless, Section 10(1) expressly provides that "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given opportunity to appeal by counsel and present any relevant testimony". This is legislative recognition of the need for representation by all interested parties in the judicial procedures to vindicate "the public interest".

<sup>33</sup> Section 10(f) provides that the person "aggrieved" by a Labor Board order may appeal to any of several designated Courts of Appeals. Section 10(e) provides that the Labor Board may seek enforcement of its orders in these same Courts of Appeals, or, if these Courts of Appeals "are in vacation, any district court of the United States, within any

principles supplement the considerations heretofore discussed and give assurance that it is consistent with the effective and fair administration of justice to recognize an absolute right to intervene under § 10(f) by a party charged with having committed an unfair labor practice.

Rule 19(a) deals with the necessity of joining as parties to a controversy "persons having a joint interest" therein. The concept of indispensability contained in Rule 19(a) "goes beyond federal jurisdiction and touches the very power or the right of the court to make an equitable adjudication, where an indispensable party is not before it." 3 Moore's Federal Practice 2146 (2d ed., 1964).

The equitable considerations underlying the need for joining indispensable parties, as recognized by Rule 19(a), are precisely the same considerations previously discussed concerning the due process requirements of permitting appellate intervention by a party whose interests are directly at stake. The governing principle of Rule 19(a) was long ago established by Mr. Justice Curtis in *Shields v. Barrow*, 17 How. 130, 136, when he said that "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties. Persons who not only have

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circuit . . . wherein the unfair labor practice in question occurred . . .". As a theoretical matter, then, the District Courts have potential jurisdiction to review Labor Board orders. But as that did not happen in this case, nor, as far as research indicates, in any other case, the Federal Rules of Civil Procedure are discussed by way of analogy only.

an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and in good conscience" are indispensable parties. See also *Williams v. Bankhead*, 19 Wall. 563, 572; *Horn v. Lockhart*, 17 Wall. 570.

While there is "no prescribed formula for determining in every case whether a person or a corporation is an indispensable party or not," *Niles-Bement-Pond Co. v. Iron Moulders' Union*, 254 U.S. 77, 80, by any standard a union would be an indispensable party to an action adjudicating its statutory liability or obligation. Had it been possible for the respondent employees to bring an action in a federal district court, seeking a declaratory judgment or an order respecting the Union's alleged violation of § 8(b) (1)(A), this Court's policy "under which indispensability of parties is determined on practical considerations," *Shaughnessy v. Pedreiro*, 349 U.S. 48, 54, would have required the joinder of the Union as a party defendant pursuant to Rule 19(a). Such practical considerations as the Union's direct interest in the suit, the obvious prejudice to the Union should an order be entered against it, and the plain inequity of resolving such a claim in the absence of the Union would all combine to require joinder, quite apart from due process considerations. Cf. *White v. Douds*, 80 F. Supp 402 (S.D.N.Y.); *Interstate Commerce Commission v. Blue Diamond Products Corp.*, 192 F. 2d 43, 46-47 (C.A. 8). No different result should follow in an appellate court proceeding under § 10(f).

In a sense, intervention by an indispensable party in an appellate court is a counterpart of joinder of an indispensable party in a district court under Rule 19(a). Both procedures are designed to eliminate the inequity and unfairness involved in adjudicating the direct interests of

an absent person and to insure that such a person has a full day in court and a full right to appeal from any adverse decision affecting his interests.

Equally analogous are the provisions of Rules 24(a)(2)<sup>34</sup> and 24(b)(2)<sup>35</sup> of the Federal Rules of Civil Procedure. Rule 24(a)(2) recognizes an absolute right to intervene in district court actions where the existing representation of the applicant's interest may be inadequate and where the applicant may be bound by a judgment in the case; Rule 24(b)(2) deals with permissive intervention in situations where "an applicant's claim or defense and the main action have a question of law or fact in common." By either standard, petitioner would be permitted intervention. Certainly there is a common question of law or fact (Rule 24(b)(2)); and, equally certainly, petitioner for all practical purposes would be bound by the judgment in the case, and the existing representation of petitioner's interest by the Labor Board "may be inadequate". (Rule 24(a)(2)).

These provisions of Rule 24 have been said by this Court not to be "a comprehensive inventory of the allowable instances for intervention." *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 505. But they do reflect a policy that "where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." *Ibid.*, 506.

Thus these intervention rules indicate a broad policy

<sup>34</sup> Rule 24(a)(2) provides that "Upon timely application anyone shall be permitted to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

<sup>35</sup> Rule 24(b)(2) provides for permissive intervention, *inter alia*, "when an applicant's claim or defense and the main action have a question of law or fact in common."

favoring if not commanding intervention where the applicant is directly concerned with public law litigation and may be bound or vitally affected by the question of law or fact to be resolved. It was that policy, coupled with the feeling that an applicant having a vital interest "should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown," that led the Court of Appeals for the District of Columbia Circuit to declare in *Textile Workers Union of America v. Allendale Co.*, 226 F. 2d 765, 770, that the lower court had abused its discretion under Rule 24 in denying intervention to a union directly concerned with the validity of the administrative determination under attack.

The basic principle of allowing intervention under Rule 24 in order to safeguard private interests in the course of enforcing a public law is fully applicable to the intervention problem in an appellate court.<sup>36</sup> That principle, similar in purport to the indispensable party concept, is designed to eliminate the unfairness and inequity in resolving private interests in the absence of the private party. And the fact that the public interest, represented by the administrative agency, is simultaneously being adjudicated does not detract from the need of intervention in such a situation. The private interest, the interest of the union in the judicial declaration of its violation or non-violation of federal law, is certain to be affected and to be bound by the outcome of the litigation. Unlike *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689-690, where the private parties were not bound by government litigation and hence had no intervention rights therein, the instant case is a classic example of private conduct being the very focal point of the government litigation and inevitably bound

<sup>36</sup> See *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514, 524-525 (C.A. 3), where the Rule 24 intervention principles were applied to an intervention problem arising in an original proceeding in that court.

by it. Intervention would seem to be a matter of right under the compelling analogy of Rule 24.

### Conclusion

When all the dictates of due process and equity, the practical considerations, the analogies of the Federal Civil Rules and the general policy of Congress regarding intervention lead to the conclusion that intervention should be allowed as of right to a charged party, it is reasonable to read § 10(f) as incorporating that right. Nothing Congress has said or done indicates any purpose to deny appellate courts the power to permit such intervention or to deny applicants the absolute right to intervene to defend their own vital interests.

Thus, as a matter of fair construction of § 10(f) and in the exercise of this Court's "general power to supervise the administration of justice in the federal courts," *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 260, the order of the court below denying intervention should be reversed with directions to permit the petitioner Union to intervene in the appellate proceedings as of right and as a full-fledged party.

Respectfully submitted,

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